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No. 10

Supreme Court, U.S.
FILED
AUG 5 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

ALDEN WHITMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated August 5, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutory Materials Involved	2
Statement of the Case	2
A. The Committee Proceedings	2
B. The Proceedings Below	6
1. District Court	6
2. Court of Appeals	10
Reasons for Granting the Writ	11
A. This Case Presents an Important Constitutional Question Which Has Not Been, But Should Be, Decided by This Court	11
B. The Judgment Below Is Inconsistent With the Controlling Decisions of This Court	14
Conclusion	22
Appendix A	1a
Appendix B	4a

TABLE OF CASES

Barenblatt v. United States, 360 U.S. 109 ..... 11, 13, 14, 15, 18, 19

Barsky v. United States, 167 F. 2d 241 (App. D.C.), *cert. denied* 334 U.S. 843 13

Bates v. Little Rock, 361 U.S. 516 ..... 12, 13

Black v. Cutter Laboratories, 351 U.S. 292 12

Braden v. United States, #54 Oct. Term, 1960, *cert. granted* 362 U.S. 960 18

Deutch v. United States, ... F. 2d .... (App. D.C. #13964, decided June 18, 1960), cert. pending, #233 Oct. Term, 1960 ..... 10, 13, 23

Page

Flaxer v. United States, 358 U.S. 147 21
Greene v. McElroy, 360 U.S. 474 12
Konigsberg v. States Bar, 353 U.S. 252 12
N.A.A.C.P. v. Alabama, 357 U.S. 449 .....12, 13
Price v. United States, ... F. 2d .... (#13925, App. D.C.), decided June 18, 1960 .....3, 10, 23
Quinn v. United States, 349 U.S. 155 21
Russell v. United States, #239 Oct. Term, 1960 18
Schware v. Board of Bar Examiners, 353 U.S. 232 ...11, 22
Scull v. Virginia, 359 U.S. 344 .....18, 19
Shelton v. United States, ... F. 2d .... (#13737, App. D.C.) decided June 18, 1960, *cert. pending* #246, Oct. Term, 1960 .....3, 10, 16, 18, 23
Sinclair v. United States, 279 U.S. 263 .....17, 22
Stirone v. United States, 361 U.S. 212 17
United States v. Cruikshank, 92 U.S. 542 17
United States v. Lamont, 236 F. 2d 312 (C.A. 2) 17
United States v. Orman, 207 F. 2d 148 (C.A. 3) 22
United States v. Peck, 154 F. Supp. 603 (D.D.C., 1957) 3, 16
United States v. Rumely, 345 U.S. 41 14
Vitarelli v. Seaton, 359 U.S. 535 16
Watkins v. United States, 354 U.S. 178 .....12, 13, 14, 15, 16, 18, 19
Wolfle v. United States, 291 U.S. 7 21

MISCELLANEOUS

U.S. Const. First Amendment 2, 11, 14, 16, 22, 23, 4a
U.S. Const. Fifth Amendment 17, 19, 4a
2 U.S.C. § 192, R. S. 102 (52 Stat. 942) 2, 6, 17, 4a
28 U.S.C. § 1254 (1) 1
Senate Resolution 58, 84th Congress 2d Session 6, 7, 14
Senate Resolution 366, 81st Congress 2d Session 2, 4, 6, 14, 15, 5a
Rule 7(c), Federal Rules of Criminal Procedure ...2, 17, 6a

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Alden Whitman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals has not yet been reported. It is printed in Appendix A, *infra,* pp. 1a to 3a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. May a witness, who has fully and freely answered all questions put to him concerning his admitted past membership in the Communist Party, refuse, under the First Amendment to the Constitution, to answer questions concerning his associates in long past lawful political activity?

2. Did S. Res. 366, 81st Cong. 2d Sess. Validly authorize the hearing and the questions which petitioner declined to answer?

3. Is an indictment under 2 U.S.C. 192 sufficient, under Rule 7(c), Federal Rules of Criminal Procedure, which fails to state the authority of the Committee, what the question under inquiry was, and how the questions asked the witness were pertinent to the question under inquiry?

4. May a witness be convicted for failure to answer questions about his associates in past lawful political activities, when the Committee fails to reveal to him either the source of its authority or the pertinency of the questions?

5. In judging the pertinency of questions which invade an area to which the First Amendment applies, is it proper to use as a standard whether the question "clearly pertains" to a subject matter "not so distant as to be irrelevant to possible present practices"?

CONSTITUTIONAL PROVISIONS AND STATUTORY MATERIALS INVOLVED

This case raises questions under the First and Fifth Amendments to the United States Constitution and 2 U.S.C. 192, Senate Resolution 366, 81st Cong., 2d Sess. and Rule 7(c), Federal Rules of Criminal Procedure. These provisions are all reprinted in Appendix "B", *infra*.

STATEMENT OF THE CASE

A. THE COMMITTEE PROCEEDINGS

Petitioner, Alden Whitman, has been a copy reader on the New York Times since 1951. (J.A. 42) On January 6, 1956, he was questioned by the Internal Security Sub-committee of the Judiciary Committee of the United States Senate. It is his refusal to answer

questions concerning the identity of his associates while he was a member of the Communist Party on which the nineteen counts of the indictment in this case are based.

The series of open hearings at which petitioner testified (hereafter called the "hearings") ran from January 4-6.[1] Fourteen of the eighteen witnesses were either past or present employees of the New York Times.[2] Both the scope of the hearings and the broad question under inquiry was the investigation of communism in general "wherever we find it" (Hearings 1587). This general topic was not made known to petitioner at the time of his appearance or subsequently, although he was questioned about his specific association with the Communist Party during a period of thirteen years. The hearings were denominated "Strategy and Tactics of World Communism (Communist activity in New York)" (Hearings, Title Page). The Chairman, in calling the Committee to order on January 4th noted that the hearings were the result of the testimony of Mr. Winston M. Burdette, a newspaper man and broadcaster, who had been a Communist from 1937 to 1940 "and had rendered a patriotic service by disclosing to the Sub-committee the names of the men and women whom he knew as members of the Communist Party". (Hearings, p. 1587) Therefore, the Chairman stated, it was the duty of the Committee "to pursue every lead which develops out of the Bur-

[1] The record of those hearings was introduced as Government Exhibit 8 at the trial. It will be cited herein as "Hearings".

[2] Four of the New York Times' witnesses were subsequently indicted for contempt of Congress. One was acquitted. *U. S.* v. *Peck*, 154 F. Supp. 603 (DDC, 1957). The others were convicted and their convictions were affirmed by the Court below. *Shelton* v. *U. S.*, — F. 2d — (No. 13737, App. D.C.), *Pet. for Cert. pending*, No. 246, Oct. Term 1960; *Price* v. *U. S.*, — F. 2d — (No. 13925, App. D.C.).

dette testimony" (*Id.*), which mainly related to newspapers. The Chairman also stated "We are not . . . investigating any newspaper or group of newspapers. we are simply investigating Communism wherever we find it" (*Id.*, 1588). Senator Hennings, on the other hand, said "the Committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency". (*Id.*)

Petitioner was not present on January 4, and heard neither of these statements. When he appeared he was not advised of the legislative purpose for which his testimony was required. Resolution 366, from which the subcommittee claimed to derive authority, did not inform Whitman of any narrower topic than Communism on a broad front.[3] The committee's explanations of individual questions pointed in conflicting directions. (Hearings 1730, 1737, 1738.)

Whitman testified that he had been a member of the Party from 1935 to 1948,—about 13 years. During the last seven of those years (1941 to 1948) he had been successively employed by the Buffalo Evening News and by the New York Herald Tribune. But the questions were not confined to the period Whitman was employed by newspapers. Prior to entering the newspaper field (from 1935 to 1941) appellant had been employed in minor capacities by the following organizations: (1) The National Committee for the People's Rights, (2) research for an undisclosed individual on a book, (3) The North American Committee to Aid

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[3] Resolution 366 is reprinted at Appendix B, page 5a, *infra*. Point 1 of the authority is plainly inapplicable to petitioner's appearance, since none of the questions asked referred to events subsequent to the passage of the Internal Security Act of 1950. Point 2 is also inapplicable because petitioner was asked no questions regarding espionage, sabotage, etc. This leaves only Point 3 which is a broad, general charter to investigate communism in general.

Spanish Democracy, (4) Films for Democracy, (5) Veterans for Democracy, (6) TASS, the Russian news agency, (7) the New York Peace Committee, and (8) the American Committee for the Protection of Foreign Born. Nine of the nineteen counts of the indictment relate to appellant's association with the above organizations. With the exception of TASS, they had nothing to do with newspapers. The period covered by the questions went back sixteen years prior to the Committee hearings.

Furthermore, the nature of the questions asked appellant makes it clear that the Committee was not interested in Whitman's own activities as a Communist either before or after his newspaper career. He was asked no questions whatever as to his Party activities. The committee did not challenge Whitman's statement that his own activities in the Party had been entirely innocent and that he himself had never taken part in any conspiracy against the Government. It sought no information on what Whitman did at Communist meetings or pursuant to Party orders or policy. It sought to know only who Whitman's friends and associates were. In the same way, in connection with the eight positions which Whitman held from 1935 to 1941, prior to his newspaper experience, Whitman was never examined as to his Party activities but only with respect to his associates.

At all times Whitman indicated complete willingness to disclose his own conduct in the Party but he was never asked about it. His refusal to answer as to his associates was based primarily upon his conscientious and constitutional objection against being cast in the role of an informer. But his statement to the Committee justifying his refusal to answer also explicitly

put into question the authority of the subcommittee, the legislative purpose of the inquiry, and the pertinency of the questions asked him. Hearings 1733. Nevertheless, he was never vouchsafed an explanation on any of these points.

B. THE PROCEEDINGS BELOW

1. District Court

Petitioner was indicted in the District Court for the District of Columbia on nineteen counts under 2 U.S.C. § 192 for failure to answer questions at the January 6 hearing. The indictment (J.A.* 4-6) alleges that the subcommittee hearings were held "pursuant to the Legislative Reorganization Act of 1946, Section 102(1)(k), 60 Stat. 818 and to Senate Resolutions 366 of the 81st Congress and 58 of the 84 Congress, and to the Standing Rules of the Senate." It further alleged that defendant "appeared as a witness before that subcommittee . . . and was asked questions which were pertinent to the question then under inquiry. Then and there the defendant unlawfully refused to answer those pertinent questions."

Petitioner moved to dismiss the indictment on four grounds: 1) It fails to allege any grant of authority to the subcommittee from the Committee on the Judiciary which authorized "the said Subcommittee to question the defendant on the matters set out in Counts One through Nineteen," or to "state the nature and scope of any such authority." 2) It fails to allege that the inquiry made of the defendant was within the scope of the Subcommittee's authority. 3) "It fails to state what was 'the Question then under inquiry' to which

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* Record references are to the Joint Appendix in the Court of Appeals.

the questions addressed to the defendant are alleged to be pertinent." 4) The indictment is void and illegal because the jury was biased by reason of the facts stated in an affidavit by defendant's counsel. (That the majority of its members were government employees subject to employee loyalty security programs). (J.A. 6-7). The District Court (McLaughlin, J.) denied the motion to dismiss. (J.A. 7).

Petitioner was tried on April 8, 1957 before Curran, J. There were two witnesses, committee counsel Sourwine for the government, and the defendant in his own behalf. Sourwine explained that Whitman had been called because the "committee had information * * * that the Alden Whitman who had been active in the Communist Party in the mid-1930's was the same Alden Whitman who was then—* * * toward the end of 1955—employed in the news department of the New York Times" (J. A. 10), and that it had other information that Whitman had been an official of, or connected with, or employed by other organizations. (J.A. 10-12). In the course of Sourwine's testimony the entire transcript of Whitman's appearance of January 6 was placed into the record.

In an attempt to establish the authority of the subcommittee, the government introduced a minute (G. Ex. 3) of the Judiciary committee containing a resolution continuing the Internal Security Subcommittee, using the name of the subcommittee (J.A. 15). Pursuant to this committee resolution the Senate passed Resolution 58 (84th Cong.) appropriating money for the subcommittee. (*Id.*) On cross-examination Sourwine stated that the minute was not available to members of the public in general and had not been made known to Whitman when he appeared. (J.A. 20-22)

Sourwine also relied on the committee calendar, which does not constitute official action of the committee, and a letter from Sourwine to members of the Judiciary Committee, stating who would serve on the subcommittee. (J.A. 17-19). Sourwine stated further that he believed that the authority of the committee was not limited to investigating illegal actions of the witness or others, and "in pursuit of its objective of gathering information affecting the internal security of the United States, it could ask questions about and inquire into activities which were in themselves lawful." (J.A. 32). He added that "Belief sometimes becomes a matter into which you can properly inquire." (*Id.*)

With regard to the "question under inquiry" the government introduced the transcript of the hearings. Sourwine stated that he doubted whether he had asked any of the witnesses at the hearing whether they had been engaged in espionage, or sabotage, and that he rarely asked such questions. (J.A. 32-33) He added that "I sometimes think a question about communist membership is a question on the subject matter of the conspiracy to overthrow the government of the United States by force and violence." He stated that the fact that fourteen of the eighteen witnesses at the hearings were present or former employees of the New York Times "was not sheer accident." (J.A. 26).

Defendant Whitman took the stand in his own behalf. He testified fully about his background in the Communist Party and other organizations. (J.A. 38-43).

After objection had been sustained (J.A. 44-46), defendant offered to prove that "at no time did he become a member of the party with the objective of engaging in the forcible overthrow of the government by force or

violence or that it was at any time represented to him that this was one of the purposes of the party." (J.A. 46). He further offered to prove as follows: His own activities in the party consisted principally of attendance at public meetings (at which political problems were discussed, but not espionage, sabotage, etc.) and occasionally selling subscriptions to the Daily Worker. His membership in the party was not clandestine. Beginning in 1942 he worked during the evening hours and so became less active. His associates in the party, like himself, were not secret members, but were engaged in purely lawful political activities. In 1939 the Communist Party had adopted a constitution which provided in part that the party did not advocate overthrow of the government by force; it was regarded as a lawful political party by the general public, and there had been no judicial finding or legislation which characterized the party as an unlawful conspiracy. (J.A. 47-48) He also testified and offered to testify further about his leaving the party: After the war, it became clear to Whitman that the party would not become the basis of a broad labor party; it also became much more doctrinaire and there was less opportunity for free discussion. The immediate incident that led to his leaving the party was that he had been asked to serve on the grievance committee of the Newspaper Guild at the Herald-Tribune, which was incompatible politically with the party, because the Communist group in the Guild had refused to cooperate with the union's administration, a policy which Whitman "simply couldn't tolerate." (J.A. 50-51)

Finally Whitman stated that the reason for his refusal to disclose the identity of persons he had known in the party, was on conscientious grounds (J.A. 52-54).

A motion for acquittal was denied. (J.A. 37-38). After the defense rested, the Court found defendant Guilty on all counts. (J.A. 54-55) Subsequently the Court denied a motion for new trial and imposed a fine of $500 and a suspended sentence of six months imprisonment on defendant. (J.A. 59, 62).

2. Court of Appeals

Whitman appealed his conviction. At the time, eight other contempt of Congress cases were pending in the Court of Appeals. These eight cases were heard on various dates in February 1960, by a single panel of the Court. (Washington, Bastian, and Burger, Circuit Judges). Whitman's case was also heard that month, by another panel. (Miller, Washington and Bastian, Circuit Judges). On June 18, the other eight cases were decided. Thereafter on July 7, the Court of Appeals in a *per curiam* opinion affirmed Whitman's conviction. (Appendix A, pp. 1a-3a) The Court's opinion explicitly rejected Whitman's contention that the questions asked were not pertinent because they referred to a period before the Communist Party became a conspiracy. With respect to the other issues the Court of Appeals affirmed on the basis of its June 18 decisions in *Shelton* v. *United States* and *Price* v. *United States* (n. 2, *supra*) and *Deutch* v. *United States*, pending as #233 Oct. Term, 1960.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Question One. May a Witness, Who Has Fully and Freely Answered All Questions Put to Him Concerning His Admitted Past Membership in the Communist Party, Refuse, Under the First Amendment to the Constitution, to Answer Questions Concerning His Associates in Long Past Lawful Political Activity?

In *Barenblatt* v. *United States*, 360 U.S. 109, 115 this Court carefully refrained from deciding whether a witness may be compelled to disclose his associates in the Communist Party, or other "communist" organizations. The question left open in *Barenblatt* is squarely presented here, in a particularly compelling context. Petitioner freely and candidly answered all questions about his own membership, but refused to reveal the identity of other individuals who petitioner believed (and offered to prove at trial) had engaged solely in entirely lawful political activities. He expressly based his refusal on conscience and the principles of the First Amendment. He shunned the role of informer, and stood firm in the conviction that under our constitutional system no arm of government has power to compel disclosure about lawful political activity innocently engaged in many years earlier.

The distinction between compelling testimony about oneself and one's associates is substantial in terms of the very balance required by *Barenblatt*, 360 U.S. 109, 126-27. The Committee's claim that it may require testimony about others strikes at the very heart of the associational rights which are guaranteed by the First Amendment. The questions which appellant refused to answer were precisely as to the identity of the individuals with whom he associated. That compulsory revelation of all one's associations is likely to have

serious inhibiting effects on the act of association itself was authoritatively recognized in *NAACP* v. *Alabama*, 357 U.S. 449, 462:

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

Accord: *Watkins* v. *United States*, 354 U.S. 178, 197. *Bates* v. *Little Rock*, 361 U.S. 516, 523.

These considerations are entirely applicable here. That past or present membership in the Communist party, exposes individuals to "economic reprisal, loss of employment . . . and other manifestations of public hostility" is a matter of common knowledge and is reflected in decisions of this Court. *Cf. Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg* v. *State Bar*, 353 U.S. 252 (1956); *Black* v. *Cutter Laboratories*, 351 U.S. 292; *Greene* v. *McElroy*, 360 U.S. 474 (1959). This is not a case where there is any suggestion that the conduct of petitioner and those individuals whose identity he refused to reveal was other than entirely innocent; petitioner's claim of privilege was based on this premise (J.A. 52-54).

Where a witness refuses to answer as to his own membership in the Communist Party, the refusal is in his own self-interest. Where he refuses to inform on his friends there can be no possible self-interest. He is risking a criminal penalty solely because his conscience tells him that he should not be a party to a scheme of exposure which will ruin persons whose association with Communism may have been entirely innocent.

The Court below decided this issue solely on the authority of its opinion in *Deutch* v. *U. S.* (now pending as #233 Oct. Term, 1960). The *Deutch* opinion had dealt with the issue quite summarily, placing exclusive and controlling reliance on *Barsky* v. *U. S.*, 167 F. 2d 241, *cert. denied*, 334 U.S. 843. But *Barsky* was decided long before this Court recognized a constitutional interest in nondisclosure. *Watkins* v. *U. S.*, *supra*; *N.A.A.C.P.* v. *Alabama*, *supra*; *Bates* v. *Little Rock*, *supra*. The Court below did not consider, in making the evaluation required by Barenblatt, the clear difference between questions relating to petitioner's own activities and questions compelling him to implicate others.

The question left open in *Barenblatt*, and raised here, is not only substantial, it is important. In light of the overriding interest which the Senate Internal Security subcommittee and the House Un-American Activities Committee have shown in compelling disclosure of past Communists, it is clear that Whitman and Deutch are not isolated cases. The dilemma of conscience which petitioner faced here may confront any non-voluntary witness before these committees.

If these witnesses can be compelled to reveal their associates they should know it; conversely, if the committee power does not extend that far, a decision by this Court should make it clear, both to keep the committees within constitutional bounds, and to relieve witnesses of the threat of contempt citation. The courts too, require further guidance on the application of the balancing approach, as the post-*Barenblatt* opinions of the court below make all too clear. The interest of this citizen to consideration by this Court on the merits of his courageous reliance on the First Amendment is itself a factor entitled to weight in passing on this petition.

B. THE JUDGMENT BELOW IS INCONSISTENT WITH THE CONTROLLING DECISIONS OF THIS COURT.

Question Two. Did S. Res. 366, 81st Cong. 2d Sess. Validly Authorize the Hearing and the Questions Which Petitioner Declined to Answer?

United States v. *Rumely*, 345 U.S. 41 held, and *Watkins* v. *United States*, 354 U.S. 178, 201 reaffirmed, the almost self-evident proposition that a witness may not be convicted of contempt before a Congressional committee for a refusal to answer unless the inquiry was authorized by the parent body. *Barenblatt* v. *United States*, 360 U.S. 109 did not disturb this holding; rather, it determined that the House Un-American Activities Committee was authorized to ask the questions which were the basis of the conviction. *Id.* at 116-123.

The subcommittee claims authority from the Senate under Senate Resolutions 366, 81st Cong. 2d Session (App. "B" *infra.*) and 58, 84th Cong. 2nd Sess. The latter is an appropriation resolution giving the Subcommittee the power to operate under Resolution 366, and is not an independent source of authority. As

shown earlier, p. 4 n. 3, *supra*, parts 1 and 2 of Resolution 366 cannot support the questions asked of petitioner. The issue is therefore whether Part 3 validly authorized the inquiry made of petitioner.

First, we submit that Part 3 lacks the specificity which *Watkins* requires in an authorizing resolution. We do not understand *Barenblatt* to eliminate this requirement; we read that case as holding that authorization may be established despite a vague resolution if other legislative materials show that Congress was aware that its general charter would be the basis of specific investigations such as the one in question. We believe that the materials cited for this purpose by the court below in its *Shelton* decision (which it followed here) cannot thus save Part 3, although we confess uncertainty as to the standard of clarity which such "legislative gloss" 360 U.S. at 121 must meet.

However, even if by reasoning akin to that in *Barenblatt*, Part 3 could be held to sustain some investigation, no such conclusion is possible in this case. For it is elementary that in order to determine whether Congress impliedly authorized the Committee to pursue any topic of inquiry one must first know what that topic is. Thus the reasoning of this issue in *Barenblatt* operated on the premise that Communist infiltration into the field of education was the topic under inquiry. 360 U.S. at 112, 121-22.

Analysis of this issue is frustrated at the outset, however, because the record leaves it entirely open to conjecture just what the topic under inquiry was. As shown in our Statement, there was evidence that the inquiry was into communism in general. But the

committee proceedings also permitted the inference that various lesser, mutually inconsistent subjects were the purpose of the investigation. Yet further views are expressed by representatives of the committee and the government at the trial (J.A. 26-27, 36-38).[4]

Thus, since the prosecution did not establish at the trial that any given subject was the topic under inquiry, it necessarily failed also to establish the authority of the committee to investigate that topic. Yet, even if a case can be said to have been made out for such a topic, none of the possible alternatives was a valid subject of inquiry under the First Amendment.

Not only did the government fail to establish that the subcommittee was undertaking a valid authorized inquiry when Whitman appeared, there is affirmative evidence in the record that the hearing was in fact never authorized by the subcommittee. Senator Hennings stated at the outset of the hearings that "the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings". (Hearings, p. 1588). Yet the rules of the committee require such a meeting.[5] *Cf. Vitarelli* v. *Seaton*, 359 U.S. 535. Thus, even if the chain of title from the Senate to the subcommittee was sufficient, the subcommittee itself never authorized these hearings. Particularly where a claim is made on so broad a charter, it is important that each investigation be authorized properly. *Cf. Watkins, supra* at 205. It should not

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[4] Contrast also the testimony given in *Shelton* (see pet. for cert. No. 246, Oct. Term, 1960, pp. 18-20); and *Peck* (Trial Tr. pp. 153-54; 212, Crim. No. 1214-56, D.D.C.)

[5] See Sourwine's testimony in *United States* v. *Shelton* (Trial Tr. 157; 159-60, Crim. No. 1215-56 (D.D.C.).

be necessary after the witnesses have been subpoenaed and appear, for one Senator to have to ask "if it is the purpose of this committee, that this is not in any sense an attack upon the free press of the United States." (Hearings, p. 1588).

Question Three. Is an Indictment Under 2 U.S.C. 192 Sufficient, Under Rule 7(c), Federal Rules of Criminal Procedure, Which Fails to State the Authority of the Committee, What the Question Under Inquiry Was, and How the Questions Asked the Witness Were Pertinent to the Question Under Inquiry?

The indictment on which Whitman was tried (J.A. 406) failed to allege that the inquiry was within the authority of the subcommittee (or the source of such authority), what the question under inquiry was, and how the questions which were the subject of the indictment were pertinent to that question. Since each of these elements is an essential fact constituting the offense charged under 2 U.S. § 192, the indictment was defective in three respects. U. S. Coast Amend. V Rule 7(c) Fed. R. Crim. Proc. *United States* v. *Cruikshank*, 92 U.S. 542.

With respect to the pleading of the committee's authority, *United States* v. *Lamont*, 236 F. 2d 312 (2 Cir. 1956) squarely holds that an indictment in this precise form is insufficient. This decision by a distinguished Court of Appeals is ample ground for review by this Court of that issue.

These same considerations apply also, of course, to the question under inquiry, by which pertinency must be tested. See *Sinclair* v. *United States*, 279 U.S. 263, 296-97. The policy of *Stirone* v. *United States*, 361 U.S. 212, that a defendant is entitled to have the grand jury consider all the elements of the offense before being tried is also frustrated by this open-ended indictment. This question is also pending in at least

three other cases. *Braden* v. *United States,* #54, Oct. Term, 1960, *cert. granted* 362 U.S. 960; *Russell* v. *United States,* #239, Oct. Term, 1960; *Shelton* v. *United States, supra.*

Question Four. May a Witness Be Convicted for Failure to Answer Questions About His Associates in Past Lawful Political Activities, When the Committee Fails to Reveal to Him Either the Source of Its Authority or the Pertinency of the Questions?

Watkins v. *United States,* 354 U.S. 178, 208-209 and 214-15, and *Scull* v. *Virginia,* 359 U.S. 344, 353, establish as a requirement of due process that a witness be given "a fair opportunity to determine whether he is within his rights in refusing to answer". 354 U.S. at 215. Essential to such a determination is that the subject under inquiry and the "connective reasoning whereby the precise questions asked relate to it" be made known to petitioner. The court below failed to follow these cases, relying on its *Shelton* opinion, which in turn rejected the identical contention on the authority of *Barenblatt.* But this case is like *Watkins,* not *Barenblatt,* for the following reasons:

Unlike Barenblatt, whose statement was taken as an understanding of the subject under inquiry, 360 U.S. at 124, Whitman expressed ignorance of the committee's legislative purpose and the pertinency of questions about his association to any valid inquiry. (Ex. 7, par. 2, 3 in Hearings, p. 1733) If this statement suggests any opinion as to the subject of inquiry it would be "the beliefs, associations and activities of individuals connected with the press" (*Id.* par. 5), the one subject which the committee staunchly repudiated in his presence (Hearings, p. 1730) and two days previously (*Id.* p. 1588). Again, unlike Barenblatt (360 U.S. at 124-25) Whitman was not the beneficiary

of any explanation at the outset of the hearing. Rather, as we have seen, the only explanations he was afforded were inconsistent. (See p. 4, *supra*). Nor was Whitman advised why he had been called. And most important, unlike Barenblatt (360 U.S. at 125), Whitman answered all questions about his own Party membership and limited his refusal to his associations—whose pertinency remains in doubt even now. In view of all the obscurity which we have shown persists even after trial and appeal, it cannot be said that the subject matter under inquiry "has been made to appear with undisputable clarity" as the Fifth Amendment requires. *Watkins, supra,* 354 U.S. at 214.

The *Watkins-Scull* principle also seems to require that the witness be made aware of the authority of the committee to ask the questions and that he be given fair opportunity to evaluate whether he has a First Amendment right not to answer. Yet, for reasons stated earlier, a witness who does not know the legislative purpose can not determine either of these questions. We respectfully submit also, that even where the legislative purpose and the pertinency of the individual question are clear, a witness will be hard-pressed to make the balancing judgment which *Barenblatt* requires.

As to all but one of the questions which are the subject of the indictment, the defendant's refusal to answer is conceded. Since one count would, under *Barenblatt,* 360 U.S. at 115, be sufficient to sustain this conviction we would allow the matter to pass in this petition, if the sole exception were not the precise question on which the court below relied most heavily in determining that pertinency had been established. (App. "A" p. 3a) We refer here to Count 8 of the

indictment. The colloquy at the hearing on this Count was as follows:

> "Mr. SOURWINE. Did you tell anyone you were quitting the party?
>
> (Consultation between witness and his counsel.)
>
> "Mr. WHITMAN. I decline to answer that one, sir, on the basis of privileged communication between me and my wife.
>
> "The CHAIRMAN. I order and direct you to answer the question.
>
> "Mr. WHITMAN. I decline, sir, on those grounds.
>
> "Mr. SOURWINE. Other than your wife, did you tell any person that you were quitting the Communist Party at the time that you say you did quit?
>
> (Consultation between witness and his counsel.)
>
> "Mr. WHITMAN. I have no precise recollection on that score." (Hearings, pp. 1745-6)

We urge that this dialogue taken as a whole provided the committee with the answer to its question "Did you tell anyone you were quitting the party" which is the subject of Count Eight. Only one determined *not* to be answered could fail to interpret Whitman's responses as "Yes, I told my wife, but I don't remember whether I told anyone else." In view of the way the original question was phrased, the claim of the husband-wife privilege unless petitioner had in fact told his wife would require an incredible subtlety. As the direction to answer was immediately followed by the question as to whether petitioner had told anyone other than his wife (to which he gave as much of an answer as his recollection permitted) petitioner had at least as much right to assume that his substantial claim of

privilege (See *Wolfle* v. *United States*, 291 U.S. 7) had been accepted as had petitioner in *Quinn* v. *United States*, 349 U.S. 155, 166. Surely, in light of this entire colloquy it cannot be said that petitioner was confronted on this question "with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt." *Id.*, cited with approval in *Flaxer* v. *United States*, 358 U.S. 147, 151, where this Court unanimously reversed because of ambiguity in direction, although the committee never got what "it was plain it wanted." *Id.* Finally, it is clear that under the interpretation which the court below placed on the Count 8 question,[6] petitioner withheld nothing pertinent from the committee. It will hardly be contended that the question "Did you tell your wife that you were quitting the party" (which is the most that remained unanswered) "clearly pertained to the mechanics of Party membership."

Question Five. In Judging the Pertinency of Questions Which Invade an Area to Which the First Amendment Applies, Is It Proper to Use as a Standard Whether the Question "Clearly Pertains" to a Subject Matter "Not So Distant as to be Irrelevant to Possible Present Practices"?

The opinion of the Court below stated that the appropriate test of pertinency is whether the question "clearly pertained" to a subject matter "*not* so distant as to be *irrelevant* to *possible* present practices" (emphasis supplied); or whether the question was "clearly pertinent" to "an investigation . . . not without relevance" to the basic issues. If it be true that lawyers are experts in the relevant, any such standard is meaningless. It is in conflict with what we believe to be

[6] In the Trial Court the government contended for a different ground of pertinency (J.A. 37-38).

the correct rule enunciated by Chief Judge Biggs in *United States* v. *Orman*, 207 F. 2d 148, 158, that

> "The individual must rely, for the protection of his privacy' upon the requirement of pertinency discussed above. When an investigation enters a field to which the First Amendment is applicable, courts will be particularly careful to check unlawful lines of inquiry".

This investigation clearly entered "a field to which the First Amendment was applicable". It asked questions about purely lawful political activities and associations; the inquiry revolved about the "New York Times" and its staff; and related to a period of from 8 to 23 years before the hearing. In view of the changes in the objectives and nature of the Communist Party, this remoteness in time is peculiarly critical on the issue of pertinency. *Cf. Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 244 and J.A. 46-47.

It may well be doubted whether raking over the dead embers of past lawful political activities could ever be relevant to any inquiry. Certainly it can shed no light on any present meaningful legislative proposal.

The Court below did not use its powers to "check unlawful lines of inquiry". It discarded the rule that pertinency, like any other element of the crime must be proven beyond a reasonable doubt. *Sinclair* v. *United States, supra.* It adopted instead a rule that if the question is "not irrelevant" to "possible present practice" it thereby becomes pertinent. This, we suggest, vitiates the entire purpose of the pertinency requirement.

CONCLUSION

Petitioner was subpoenaed to appear before the Internal Security Subcommittee of the Senate Judiciary Committee. He answered all questions about himself, admitting his own membership in the Com-

munist Party and other related conduct. He refused, however, to reveal the identity of his associates in lawful political activity, many years earlier. He knew that exposure "would be terrible trouble on the shoulders, on the heads of people who were as innocent as I of any wrongdoing." He felt that it would be "a mean and ignoble thing if I would be the vector, the agent to bring destruction on people." This case thus presents poignantly and directly a question which this Court has left open, whether the First Amendment's protection of lawful speech and assembly extends to a citizen whose conscience does not permit him to inform against his former political associates. This question, presented also in #233, *Deutch* v. *United States*, most emphatically merits decision by this Court.

Certiorari should be granted also because conviction on this record would be inconsistent with the applicable decisions of this Court. Though the committee's authority to ask the questions is an almost self-evident prerequisite of its contempt power, that authority was never proven. The resolution under which it claimed to operate lacked the precision which *Watkins, supra*, required. The power to ask the individual questions also could not be established because their legislative purpose remains a mystery even now. The record is replete with ambiguities and inconsistencies about "the question under inquiry"; the confusion is compounded by the positions taken by committees, government counsel and the lower courts in other cases arising out of the same hearings, two of which will also be before this Court. *Shelton* v. *United States, supra; Price* v. *United States, supra.* For the same reason, the due process requirement that the pertinency of a question be made clear to the witness at the hearing was not met in any of these three cases. The allegations

of the indictment were insufficient to state an offense, in direct conflict with a decision of the Second Circuit, and contrary to a long-established principle reaffirmed at the last Term here. The courts below applied a pertinency test which differs sharply from that of the Third Circuit, and which indeed renders meaningless this well-settled requirement for a contempt conviction.

Finally, these questions arise in the context of a hearing seemingly directed at a single great newspaper, raising the suspicion, which the committee's self-serving declarations will not allay, that freedom of the press, as well as the rights of conscience and association of the citizen, hangs in the balance.

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Dated August 5, 1960

APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,416

ALDEN WHITMAN, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court
for the District of Columbia

Decided July 7, 1960

Messrs. Thurman Arnold and *Gerhard P. Van Arkel*, with whom *Mr. George Kaufmann* was on the brief, for appellant. *Mr. David I. Shapiro* also entered an appearance for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Carl W. Belcher*, Assistant United States Attorney, and *Miss Doris H. Spangenburg*, Assistant United States Attorney, were on the brief, for appellee.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: Alden Whitman, a copy reader on the New York Times, was found guilty on all 19 counts of an indictment charging him with refusing to answer certain questions put to him by the Senate Internal Security Subcom-

mittee,[1] and was given a suspended sentence of imprisonment for six months and a fine of $500. He appeals.

Whitman presents five arguments for reversal: (1) The scope of the topic under inquiry by the Subcommittee was too broad and indefinite to illuminate the pertinency of the questions in the indictment; (2) the questions in the indictment are not pertinent to any authorized inquiry since they concern Communist Party associations during a remote period when the conspiratorial character of the Party was obscure; (3) any question about associates in the Communist Party, as distinguished from one's own Party activities, lacks pertinency; (4) even if the questions were pertinent, Whitman's personal interest, under the First Amendment, in following the dictates of his conscience overbalanced the interest of Congress in exposure of Communist Party members; and (5) the Subcommittee's inquiry was devoted to investigating the New York Times, and thus invaded the field of freedom of the press.

Insofar as the subject under inquiry is concerned, the questioning of Whitman was substantially similar to that of the appellants in No. 13,737, *Shelton* v. *United States*, and No. 13,925, *Price* v. *United States*, both decided by this court on June 18, 1960. In light of those decisions, the claims covered by the first and fifth contentions must be rejected. And in view of the decision in No. 13,694,

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[1] Violations of 2 U. S. C. § 192, which is:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. (R. S. § 102; June 22, 1938, ch. 594, 52 Stat. 942.)"

Deutch v. *United States*, also decided on June 18, 1960, the third and fourth contentions cannot be a basis for reversal.

As to appellant's second claim, we note that at least half of the indictment questions, those in counts one through eight, referred to the Communist Party in the post World War II period prior to 1949. It was at that time that Whitman himself, according to his own offer of testimony at trial, became especially conscious of the questionable character of the Party. Moreover, one of the questions—"Did you tell anyone you were quitting the Party?"—clearly pertained to the mechanics of Party membership at a time not so distant as to be irrelevant to possible present practices. Given the presently considered conspiratorial nature of the Party, a common belief of which Whitman does not claim ignorance, it would seem that the questions in counts one through eight were clearly pertinent to an investigation of subversive activities as manifested by the organization of members of the press into Communist Party cells in the period following World War II, and such an inquiry was not without relevance to Party activities in 1956, when the Subcommittee questioned Whitman.

Affirmed.

APPENDIX "B"

Constitutional and Statutory Provisions Involved

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2 U.S.C. § 192, R.S. 102 (52 Stat. 942), as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Congress, 2d Session, provides:

"Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

"Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

"Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintains a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"*Resolved*, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

Rule 7(c) F.R. Crim. Proc. provides in pertinent part as follows:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count.